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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of the Interior, ET AL.,
Petitioners,

VERSUS

GLOVER CONSTRUCTION COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINION BELOW

The citations to the opinions in the United States Court of Appeals and the District Court contained in the Petition for Writ of Certiorari are accurate.

JURISDICTION

The statement of jurisdiction contained in the Petition is accurate.

QUESTION PRESENTED

The question presented is accurately and succinctly stated in the Petition.

STATUTORY PROVISIONS INVOLVED

The Petition accurately and adequately sets forth the statutory provisions involved.

THE PARTIES

The parties herein will be referred to as they appeared in the Court of Appeals for the Tenth Circuit; that is Petitioners (The Secretary of the Interior, *et al.*) as Appellants or the Government and Respondent (Glover Construction Company) as Appellee.

STATEMENT OF THE CASE

In March of 1976 Appellants, by and through the Commissioner of Indian Affairs, issued a memorandum interpreting 25 U.S.C. § 47, recently known as the Buy Indian Indian Act. 25 U.S.C. § 47 was originally a proviso to a statute passed in 1910. Under the 1976 interpretive memorandum, bidding on contracts with Appellant's agency is restricted to Indian owned companies. Non-Indian companies are permitted to bid only if Indian companies are not available.

On March 25, 1977, a contract for the construction of five miles roadway in Pushmataha County, Oklahoma, was awarded to Indian Nations Construction Company. Appellee requested the opportunity to bid on the project, but was not permitted to bid because Appellee's company is not Indian owned. The contract price was $1,219,481.00. The engineer's estimate was $963,117.48. The first five miles of the roadway was built by Appellee, under normal bidding procedures, at a price of $538,000.00.

Appellee filed suit in the district court, asserting that the agency's interpretation of 25 U.S.C. § 47 was arbitrary, capricious, and unreasonable, and that the same was in violation of 41 U.S.C. § 253. Appellee further asserted that the contract with Indian Nations was void for the same reasons the agency's interpretation of the statute was invalid. Both parties filed motions for summary judgment.

41 U.S.C. § 252(c) makes all purchases and contracts for property and services subject to the advertising requirements of Section 253 of that title, unless the contract comes within one of the fifteen enumerated exceptions of Section 252(c). Subsection (e)(B) of Section 252 specifically provides that Section 252 shall not be construed to permit any contract for the construction of roads to be negotiated without advertising as required by Section 253, unless the contract is to be performed outside the Continental United States or unless negotiation is authorized by paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of Section 252.

In the district court, Appellants asserted that the negotiation of roadway contracts by the Bureau of Indian Affairs was permitted under the "otherwise authorized by law" exception stated in paragraph 15 of Section 252(c). In support thereof, appellants argued that Section 252(e) was merely an admonition and not a prohibition. Also, they urged that 25 U.S.C. § 47 has been interpreted for many years to allow construction contracts to be restricted to only Indian contractors.

The district court rejected the argument that 252(e) was merely an admonition (Petition of Appellant, App. D,

40a). The court noted that Congress specfically exempted seven subsections of Section 252(c) with respect to road construction, but did not include the "otherwise authorized by law" provision of subsection (c)(15) (Petition of Appellant, App. D, 40a).

The Court went on to find that the rule of deference to an administrative interpretation did not apply to this case because the statute was enacted in 1910 and the complained of interpretation, set forth in the 1976 bulletin, may date back as far as 1961 (Petition of Appellant, App. D, 46a).

The court's judgment declared the complained of contract null and void and permanently enjoined the appellants from "circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future roadway construction contracts".

Thereafter, the Government appealed to the 10th Circuit Court of Appeals. The above mentioned arguments were again asserted by the Government and were rejected by the appellate court. In addition thereto, the Government argued that the district court had erroneously concluded that the Federal Property and Administrative Services Act impliedly repealed 25 U.S.C. § 47 and that negotiated roadway contracts should be permitted under a liberal interpretation of 25 U.S.C. § 47, in order to accomplish the remedial purposes of the act.

The court found no conflict, and thus no implied repeal, in 41 U.S.C. §§ 252 and 253 and 25 U.S.C. § 47. The court simply declined to accept the position that the purchase of "Indian supplies" and "products" on the "open market" related to roadway construction contracts (Petition of Appellant, App. A, 14a). The court noted that "It is clear, on its face, however, that the Congress did intend that U.S.C.A. §§ 252 and 253 apply to road construction projects" (Petition of Appellant, App. A, 15a).

The court acknowledged that 25 U.S.C. § 47 is a remedial act and is to be given a liberal interpretation. However, the court noted: "Even so, we believe it strains the most liberal construction to conclude the act's preference for purchase of "Indian supplies" and "products" applies to a roadway construction project whose contract price, through Indian construction, is $1,219,481.00 (Petition of Appellant, App. A, 19a).

The decision of the district court was AFFIRMED.

REASONS WHY THE PETITION FOR WRIT SHOULD BE DENIED

The evidence in the instant case certainly does not support the Government's appraisal of the importance of, and the value of, the complained of policy to the Indian community.

Depositions of BIA officials revealed that the Government had made no inspections or investigations to ascertain whether Indian workmen were being employed on the project in question. From the depositions, it clearly appeared that there was not one shred of evidence which showed that even one Indian employee or laborer had benefited from the complained of policy. The record further disclosed that the real beneficiaries of the policy were the corporate officials of Indian Nations Construction Company. The president, Billie W. Crain, a one-quarter (¼)

degree Seminole Indian, lists his occupation as an administrative Law Judge with the Department of Health, Education and Welfare, and states his net worth at $186,546.00. The Vice-President, Nat Marshall, one-quarter (¼) degree Choctaw, lists his occupation as self-employed rancher and construction, and states his net worth at $455,350.00. The treasurer and general manager, Hubert Day, a non-Indian, states his net worth at $1,350,000.00.

These facts are particularly significant when it is remembered that the contract price on the roadway in question was $1,219,481.00; that the engineer's estimate of the construction costs was $963,117.48; and that the first five miles of roadway on the same road, under competitive bidding, was $538,000.00.

Simply stated, the record in this case simply does not support the Government's assertions that the policy in question is of great benefit to the Indian community. On the other hand, the record indicates that the policy in question does generate windfall profits for administrative law judges and wealthy businessmen of marginal Indian blood.

Appellees would urge this Court to consider the practical aspects of this case. Appellee has simply requested that the Government be compelled by the courts to obey the law, and for reimbursement for his attorney fees and costs. In Appellee's quest to require the Government to comply with the law, he has been confronted at each step of the proceedings with vigorous resistance from the Department of Justice, with all of its manpower and resources. It has been very expensive. It has been difficult;

and, in some respects, it has been frustrating and unrewarding. During almost all the time this case has been on appeal to the 10th Circuit, then to this Court, the enforcement of the injunction has been stayed at the Government's request. Even though the district court declared the contract in question null and void, the Government has been free, during most of the time since that ruling, to carry out the illegal contract and enter into new illegal contracts.

The two distinguished courts have found little difficulty in determining that the Government's position is contrary to law. Unless this litigation is completed expeditiously, the roadway in question will be completed and this Appellee will have, as a practical matter, achieved virtually nothing.

The Government's capacity to finance seemingly endless appeals and stay orders has a very chilling impact on any undertaking to force the Government to obey the law.

This Appellee is ready, willing, and able to try this case on the merits if this Court grants certiorari; however, this Appellee would respectfully request that, if certiorari is granted, the Court reconsider its holding in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 250, wherein this Court eliminated the private attorney general theory as a basis for awarding attorney fees in this type of litigation.

The Government, in urging this Court to grant certiorari, suggests that the language of 25 U.S.C. § 47 should be broadly construed to include roadway construction be-

cause the act was intended to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements. Further, that the remedial purposes of the act require a liberal construction (Petition of Appellant, p. 14).

The language of the statute, and the circumstances surrounding its enactment, do not support the above stated conclusions. 25 U.S.C. Sec. 47 provides:

> "So far as may be practicable Indian labor shall be employed and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

Section 47 was codified from the act of June 25, 1910, ch. 431, § 23, 36 Stat. 861 which provides in its entirety as follows:

> "That thereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty seven hundred and nine of the Revised statutes of the United States: Provided, that so far as may as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. All acts and parts of acts in conflict with the provision of this section are hereby repealed."

Section 3709, now codified as 41 U.S.C. § 5, required advertisement before purchases were made by governmental agencies. Thus, we find 25 U.S.C. § 47 was merely a proviso in a legislative act that had as its unquestionable purpose the aim of making the purchase of "Indian supplies" subject to the advertising requirements of the law.

It is generally held that the proper function of a proviso is to restrict, limit or qualify some portion of the enacting clause of the statute wherein it is contained. Provisos should be strictly construed.

With the facts concerning the enactment of Section 23 of the Act of June 25, 1910, in mind, and applying general rules of construction, the proper interpretation of Section 23 is clear. Congress intended that the purchase of "Indian supplies" be subject to advertising requirements, but that in obtaining those supplies the Secretary of Interior, when it was practical to do so, could show a preference for Indian labor and Indian products or articles available in the open market.

Within the context of this case two inescapable questions arise:

1) Does five miles of roadway, costing over a million dollars, fall into the category of "Indian supplies"?

2) Is five miles of roadway in Pushmataha County, Oklahoma, a "product" or article for sale on the "open market"?

Plaintiff submits to the Court that the only reasonable answer to the foregoing questions is "no". To interpret the statute in question so that five miles of roadway in Pushmataha County, Oklahoma, could qualify as "Indian supplies" or an "Indian product" available on the "open market" would be virtually to ignore numerous admonitions by this Court on statutory interpretations.

> "The plain, obvious, and rational meaning of statute should be preferred to any curious, narrow hidden sense." *Old Colony R. Co* v. *Commissioner of Internal Revenue,* 284 U.S. 552, (1932).

> "The Supreme Court must read a statute according to the natural and obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *U. S.* v. *Temple,* 105 U.S. 97, (1882).
>
> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Sanborn* v. *Commissioner of Internal Revenue,* 301 U.S. 700 (1937).

Respondent submits to the Court that it would, indeed, take an acute and powerful intellect to conceptualize five miles of roadway as being within the purview of "Indian supplies" and "products" available on the "open market". On the other hand, the plain, obvious import of the language is that, with respect to such commodities as bolts of cloth, foodstuffs, blankets, or even electronic calculators, a preference in favor of Indian labor and Indian-made articles is appropriate where it is practical to grant such a preference.

In light of the foregoing, it is apparent that 25 U.S.C. § 47 has no application to the roadway construction project which is the subject matter of this lawsuit, and that only an unusually strained, arbitrary and unreasonable construction of the statute would make it controlling.

It is generally agreed upon by all parties that 25 U.S.C. § 47, because of its remedical nature, should be liberally construed. A liberal construction does not authorize a court, or an administrative agency, to place a construction upon the language which substitutes its concept of what is right

for the actual legislative intent. In *62 cases of Jam* v. *United States,* 340 U.S. 593, 600 this Court stated:

> "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

Also, the Government urges this Court to grant certiorari because the two previous courts' reliance on § 252 (e)(B) was misplaced (Petition of Appellant, p. 17). It is argued that 41 U.S.C. § 260 was enacted to preserve existing exemptions from competitive bidding requirements, and that the same exempts the BIA from following Sections 252 and 253. That the existing exemption to be preserved arises from the Buy Indian Act. Thus, it clearly appears that the assertion that Section 260 relieves the BIA from advertising is predicated entirely on the position that the Buy Indian Act embraces roadway construction projects. The district court and the Court of Appeals held that it did not. Appellee has previously stated herein its reasons for suggesting that the act does not so apply.

The conclusions of the two lower courts is supported by the expression of Congressional intent concerning the passage of 41 U.S.C. § 252 in 1949 by the following statement found in *House Report No. 670,* May 24, 1949, 81st Cong., 1st Sess., 1949 U.S. Code Cong. and Adm. News, 1457, 1498 wherein it stated:

> "(e) For clarity this subsection provides that Section 302, 41 U.S.C. 252, does not authorize or change the existing requirements for authorization for the erection or repair of buildings, *roads,* sidewalks, or similar items." (emphasis added)

Clearly, twelve years later in 1961, or arguably 27 years later in 1976, the BIA, without the aid of Congress, has attempted to carve out a new exemption or change in the existing requirements for the erection of roads.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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